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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>LATRESHA BLACKSHELL,<br>Defendant and Appellant. | A104020<br><br>(Solano County Super. Ct. No. FRC188863) |

Latresha Blackshell appeals from her conviction of one count of child abuse or endangerment in violation of Penal Code section 273a, subdivision (a).[1] She argues that the trial court should have held a third hearing regarding her competence to stand trial and that assuming she was competent, the court should have allowed expert evidence on the effect of her mental condition on the elements of the charged crime. We determine that there was insufficient evidence to trigger another inquiry as to defendant's competence and that the trial court correctly excluded the proffered expert testimony and affirm the judgment.

BACKGROUND

Defendant's daughter, MB, was born on May 10, 2000, and was a normal baby weighing about seven pounds. MB came to the attention of the authorities on December 6, 2000, when defendant rushed into a restaurant with the baby, asking for help. Restaurant patron Ted Harris stepped forward and unzipped the baby's clothing. The

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

baby did not appear to be breathing. Harris performed cardiopulmonary resuscitation (CPR) until paramedics arrived. Based on her small size and weight, Harris estimated the baby's age at one month.

MB was taken to North Bay Medical Center in critical condition and was promptly transferred to Children's Hospital in Oakland. At that time, although she was seven months old, MB weighed only eight pounds. Dr. James Crawford, an expert in forensic pediatric medicine, examined MB about one week after her admission to Children's Hospital and observed that she was very small and very underweight. When first admitted, MB had a number of critical problems, including a significantly reduced body temperature, a blood sugar level so low it was incompatible with life and she was breathing at a rate of five or six times a minute, which necessitated being placed on a ventilator. MB had gone from being a normal healthy baby at birth to a severely malnourished seven-month-old individual that was near death.

Once her nourishment was under control, doctors discovered that her brain was very abnormal. Her abnormal neurological functions included less muscle tone to control her trunk, chest and belly. Her muscles were extremely wasted. She was developmentally delayed, to the point that she did very little. In Dr. Crawford's opinion, MB's neurological problems were caused by a prolonged period of starvation.

MB remained in the hospital for four weeks, receiving assistance in breathing and artificial nourishment, until she could breathe and eat on her own. When discharged, her weight had doubled, but was only equal to that of a three and one-half month old baby. She did not return to a normal weight until she was about 10 months old. After discharge, she developed seizures. At the time of defendant's trial, she was over three years old and had extremely limited language skills and demonstrated continuing neurological problems.

Dr. Crawford spoke with defendant at Children's Hospital. Defendant was cooperative. He explained that MB was critically ill and would have died without medical intervention. Defendant stated that if the baby had not stopped breathing,

defendant thought she was normal. Defendant told Dr. Crawford that MB was a good eater, and that she was feeding the baby adult food, like pretzels that she would chew up and give to the baby. Defendant also fed her formula, but was mixing one scoop, instead of four scoops, in eight ounces of water. Defendant said she did not take MB to doctors because God would take care of the baby.

Detective John Cooper was dispatched to North Bay Medical Center to see MB. He noted that she was so thin he could see her full rib cage and the outline of her bones. She was attached to life saving equipment. A picture taken by hospital staff was introduced in evidence at defendant's trial. Cooper spoke to defendant in the waiting room.

Defendant had two other children, a boy about six years old and a girl about two years old. They appeared healthy to Cooper. Defendant told Cooper that she was living in bus stops with her mother and the three children, but that she had plenty of money for food. Defendant said that she fed MB mostly watered down mashed potatoes in a bottle. The day the baby stopped breathing, defendant fed her some commercial baby food, water and milk in a bottle. Defendant told Cooper that she did not believe in or trust doctors.

On January 25, 2001, defendant was charged with one count of child abuse (§ 273a, subd. (a)). The preliminary hearing was held on February 14, 2001. On October 3, 2001, the proceedings were suspended and defendant was referred for a psychiatric examination (§ 1368). The court ordered Drs. Kathleen O'Meara and Carlton W. Purviance to report to the court as to defendant's mental competence to understand the nature and purpose of the proceedings, her ability to cooperate with counsel in presenting a defense and her ability to prepare a defense in a rational manner without counsel. On November 7, 2001, the court found that defendant was not competent to stand trial within the meaning of section 1367. On November 28, 2001, the court committed defendant to Patton State Hospital.

In September of 2002, the Medical Director of Patton State Hospital certified defendant's mental competency. The court reinstated criminal proceedings on October 1, 2002.

The court again suspended the proceedings on November 12, 2002, and ordered a second mental competency examination. On December 10, 2002, the court again found defendant not competent to stand trial. On December 31, 2002, defendant was again committed to Patton State Hospital.

On May 9, 2003, the court found defendant competent to stand trial and reinstated the proceedings. The trial began on July 17, 2003.

Defendant testified at the trial. She stated that she moved to Pittsburgh from Rochester, New York with her mother, children, brothers and sisters in 1999 because "that's where the Lord told me to go." She had a falling out with other members of her family because they tried to kill her with witchcraft and voodoo.

After Pittsburgh, defendant and her family stayed in Charlotte, North Carolina for five months because that was where the car broke down. They lived in the car and in motels. She was pregnant with MB when they left North Carolina and came to San Francisco. They stayed in motels while they looked for housing. She testified that she declined medical care while she was pregnant because she did not want to take the vitamins. She believed that any medication "tears down the body."

After MB was born, she received some services from Homeless Prenatal and lived in a hotel. She left San Francisco in June of 2000 to go to Opportunity House in Vacaville. Opportunity House provided meals, but defendant believed that "people put things in food," through witchcraft and she would not eat it. Defendant could smell a perfume-like smell in the food that revealed the witchcraft. While she was at Opportunity House, defendant did take the baby to the hospital once for a rash. She thought MB was okay at that time. When she refused to let the people at Opportunity House hold her money, she was evicted.

Defendant worked for a time, but had to quit because her body was tired. Some nights she had to stay on the street. Sometime thereafter, she lost her financial assistance. She and her family went to Fairfield because it was cooler there. She was not successful in finding a place to live, and sometimes stayed in a bus shelter. People gave her money and she bought food for the baby. She fed the baby instant mashed potatoes, powdered baby formula and adult food that defendant chewed up for the baby.

Defendant noticed in September or October of 2000 that MB started throwing up her food often. Defendant was not worried and thought this was normal. The baby was throwing up all the time until she stopped breathing and defendant took her to the restaurant for help. She noticed MB was losing weight, but she did not believe in doctors and thought God would take care of the baby better than a doctor could. Defendant thought the baby was too thin, but believed she was all right. Defendant disputed the testimony of prosecution witness Charlene Moniz that she tried to hide the baby from social workers. The first time defendant knew something was wrong with the baby was when she stopped breathing. If she had known MB was in danger of death, she would have sought help.

On July 24, 2003, a jury convicted defendant of child abuse as alleged in the information. On September 11, 2003, the court sentenced defendant to the midterm of four years in state prison. The court awarded custody credits of 1262 days. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that she was denied due process because substantial evidence indicated the presence of a doubt as to defendant's mental competence to stand trial that should have triggered a third section 1368 hearing. We have reviewed the entire record and conclude that no evidence indicated a doubt as to defendant's competency to stand trial. Defendant also contends that assuming she was competent, the trial court should have admitted expert testimony as to the impact of her mental condition on her ability to form the requisite intent to commit the charged crime. Because defendant's crime is a

general intent crime, we conclude that the proposed testimony as to her subjective state of mind was properly excluded and affirm the judgment.

Evidence Necessary to Require A Section 1368 Examination

Defendant cites *Drope v. Missouri* (1975) 420 U.S. 162, 171 (*Drope*) for the proposition that: "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[2] It is undisputed that state procedures must exist to protect against the conviction of a legally incompetent person. (*Pate v. Robinson* (1966) 383 U.S. 375, 377-378.)

California's state procedures are found in sections 1367 and 1368. Section 1367 provides in relevant part that: "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner."

Section 1368 provides in relevant part as follows: "(a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent . . . . At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court

[2] The court *People v. Harrison* (2005) 125 Cal.App.4th 725, 731 (*Harrison*) noted that in *Drope, supra,* 420 U.S. 162, the evidence "that the defendant had previously received psychiatric treatment for bizarre behavior, had attempted to kill the prosecuting witness just before the trial, and had attempted suicide during the time he was on trial, 'created a sufficient doubt of his competence to stand trial to require further inquiry on the question.' [Citation.]" Nothing similar to that behavior occurred in this case.

shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing."

The standard set out by our Supreme Court was discussed in the recent case of *Harrison, supra,* 125 Cal.App.4th 725. The *Harrison* court noted that in *People v. Jones* (1991) 53 Cal.3d 1115, the court held that a competency hearing is required only when the defendant presents substantial evidence of incompetence. (*Harrison, supra,* at pp. 731-732.) When the evidence raises a doubt as to competence, the trial court must, on its own motion, order a competency hearing. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1020 (*Ary*).) On appeal, we do not decide actual competency, but only determine, "whether there was evidence sufficient to raise a reasonable doubt as to defendant's competence to stand trial." (*Ary, supra,* at p. 1021.)

In this case, defendant lists a number of circumstances that she contends are sufficient to raise a doubt as to her competence to stand trial. She argues that she was "probably insane" at the time of the crime. There was no evidence presented that defendant was insane. She bases this contention on the court's comment at sentencing, made in the context of defendant's choice not to enter a plea of not guilty by reason of insanity. The court stated: "This is a very troublesome case, because the law does have a way of dealing with criminal defendants who commit their crimes while suffering from mental disease, and I think that clearly was the defendant's situation." The court also observed: "The injury that was done to the child who was the victim in this case was horrendous. I don't think the fact that she has failed to express remorse in this matter is indicative of anything other than the fact that she simply doesn't recognize how dangerous her conduct has been. And clearly, again, I think this is an outgrowth of the fact that she was suffering from a mental disease at the time of this offense, but it is disturbing now today that she has undergone nearly a year of mental health treatment, and she still has no insight into the wrongfulness of her actions."

These observations at the time of sentencing are comments on defendant's mental status at the time of the crime, and not on her ability to understand the nature and purpose of the criminal proceedings, or her ability to cooperate with counsel in presenting a defense. A lack of insight into the nature of her actions does not compel a hearing on defendant's competence to stand trial.

Defendant also argues that she was twice found incompetent, and was restored to competency approximately two months before the trial started. But this past circumstance has no bearing on whether there was any evidence sufficient to raise a doubt as to her present competency to stand trial.

Defendant argues that the medical experts that evaluated her stated that she could not rationally reject the option of a mental defense because she did not recognize she was mentally ill. She identifies specific reports from experts that informed the court that it was critical that she continue taking her medication. One of the cited reports was dated October 19, 2001, prior to defendant's last restoration to competency and expressly related, not to her competency to stand trial, but to her mental state at the time of the offense. The other report is a letter from Dr. Purviance dated December 6, 2002, which stated that the cessation of defendant's medication is the most significant factor in his conclusion that defendant was not competent to stand trial. The trial court found defendant not competent to stand trial after that letter was issued and committed her to Patton State Hospital. The April 1, 2003 report stated that defendant was now "pleasant, appropriate, and cooperative with staff and peers," and that it was the consensus of her treatment team that she "possessed a good knowledge of the courtroom procedures and the roles of the officials" and "again demonstrates an ability to assist her attorney in her defense."

Contrary to defendant's claim that the doctor's reports showed her present incapacity, the 2003 report in the record found her competent to stand trial. The fact that defendant rejected a not guilty by reason of insanity plea is not evidence of incompetence. The only evidence regarding defendant's ability to continue taking her

medication was a short discussion of an approximate two-week period when she was taking pain medication for a tooth abscess and the antipsychotic medication was incompatible. Defendant resumed the antipsychotic medication when the abscess was resolved.

Finally, defendant argues that her testimony that she believed in witchcraft constitutes evidence of her incompetence. But the same experts who evaluated defendant expressed the opinion that her belief in witchcraft was cultural and a product of her family environment. The psychiatric report stated that defendant's cultural belief in witchcraft did not preclude her cooperation with defense counsel.

We have reviewed all of defendant's testimony and find nothing remotely similar to the evidence present in *Ary, supra,* 118 Cal.App.4th 1016 or *Harrison, supra,* 125 Cal.App.4th 725. To the contrary, defendant appeared composed and rational both on direct and cross-examination. She recognized that her baby was thin, but stated that she thought it was a transient condition. Her other children showed no similar abuse. The fact that defendant denied knowledge of the baby's condition is not an indication of incompetence. When the sentencing court asked if defendant was taking her medication, counsel responded that she had resumed after her tooth abscess was treated. The court asked: "Do you have any reason to believe that she's not competent to proceed this morning? Do you feel like she's fully understanding . . . ." Defense counsel responded: "I do, your Honor. I feel that she's competent."

Contrasting defendant's case with that of the defendant in *Ary, supra,* 118 Cal.App.4th 1016 illustrates the lack of substantial evidence in this case. In *Ary*, the trial court commented that the defendant "ain't the brightest bulb," and found that his confession was coerced. (*Id.* at p. 1019.) The defense argued that defendant's mental retardation made him incapable of understanding his rights and introduced expert evidence that defendant suffered from a " 'severe mental impairment.' " (*Id.* at p. 1021) The experts testified that defendant scored at a kindergarten level for name memory and visual matching. His academic skills were very poor. On each cognitive assessment test,

defendant scored in the lowest first percentile of the population. (*Id.* at p. 1022.) The court determined that the extensive evidence of defendant's lack of mental capacity raised a doubt as to his competence to stand trial.

Defendant in this case understood the nature of the proceedings, made a decision about her defense, testified rationally and coherently at the trial and expressed appropriate frustration and anger when she was sentenced to prison. Her response at sentencing contained no hint that she did not understand the nature of the proceedings. Her trial counsel did not believe she was incompetent. The sentencing judge was the same trial judge that ordered the prior section 1368 hearing and was familiar with defendant's problems. The evidence in the record available to the court after defendant was restored to competence did not raise a doubt as to her present competence to stand trial.

Expert Evidence of Mental Capacity

Despite her refusal to enter a plea of not guilty by reason of insanity, defendant filed an in limine motion requesting the trial court to allow the testimony of two expert witnesses to show that defendant's mental illness prevented her from understanding the wrongfulness of her actions at the time of the crime. Defendant contended that her mental illness adversely impacted the knowledge element of the charged crime. The court excluded the evidence on the ground that section 273a involves only an objective test of awareness of the risk of harm and was a general intent crime. We agree with the trial court.

Defendant's motions sought admission of the testimony of Dr. Purviance and Dr. Ruiz on the issue of defendant's "ability to appreciate the gravity of her child's condition." She explained that she sought to "negate the element of general criminal intent and/or criminal negligence" and to show that she believed that evil spirits were poisoning the food she would have otherwise fed to her baby.[3] She argued that the expert

[3] Defendant did not hint that she had refused to feed the baby because of witchcraft. To the contrary, she testified at trial that she fed the child appropriately. Her belief that food was poisoned by witchcraft related only to the meals served to the adults at Opportunity House.

testimony would show that her mental illness "affected her understanding of the gravity of [MB's] condition" and that she harbored no "evil design" or "intent to starve."

Evil design and specific intent to starve are not part of the general intent crime defined by section 273a. Section 273a, subdivision (a) provides: "(a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years." Defendant argues that the word "willfully" imports an element of knowledge requiring proof that the defendant knew the nature of her actions. She relies on this court's opinion in *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 (*Jerry R.*).

*Jerry R.* does not change the result of this case. The defendant in *Jerry R.* was charged with the crime of willfully discharging a firearm in a grossly negligent manner that could result in injury or death. (*Jerry R., supra,* 29 Cal.App.4th at p. 1438.) We merely stated that: "The prohibited conduct, the discharge of a firearm, is commonly understood to mean the firing or shooting of a weapon by expelling the charge or bullet." (*Id.* at p. 1439.) A defendant who believed the gun was not loaded would have committed only the act of pulling the trigger of an unloaded gun.

We explained that a willful violation of a statute requires " 'simply a purpose or willingness to commit the act . . . ,' without regard to motive, intent to injure, or knowledge of the act's prohibited character. [Citation.] The terms imply that the person knows what he is doing, intends to do what he is doing, and is a free agent. [Citation.] Stated another way, the term 'willful' requires only that the prohibited act occur intentionally." (*Jerry R., supra,* 29 Cal.App.4th at p. 1438.) Merely because a penal statute contains the word "willful" does not imply a requirement that the defendant was aware that her actions were culpable. (*People v. Valdez* (2002) 27 Cal.4th 778, 787-788

(*Valdez*).) *Jerry R.* did not involve a defense of mental illness and did not transform a general intent crime into a specific intent crime. It did not involve a defendant who intentionally committed the prohibited conduct, but claimed not to understand the nature of her conduct.

The crime of child abuse or endangerment, in both the direct and indirect applications of physical pain or mental suffering on a child, does not turn on a defendant's subjective state of mind. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1224 [direct infliction of unjustifiable physical pain by shaking is general intent crime]; *Valdez, supra,* 27 Cal.4th at pp. 789-790 [mens rea for indirect infliction of abuse is criminal negligence, viewed under objective "reasonable person" standard].) The court in *Valdez* explained that: "Criminal negligence is not a 'lesser state of mind'; it is a standard for determining when an act may be punished under the penal law because it is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances. (*Valdez, supra*, 27 Cal.4th at pp. 789-790.)

Section 28 expressly prohibits evidence of a mental disorder to "show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act." The statute allows admission of such evidence "solely on the issue of whether or not the accused actually formed a required specific intent . . . when a specific intent crime is charged." Section 29 addresses the use of expert evidence about a defendant's mental disorder by precluding such testimony, "as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged."

The expert evidence defendant sought to have admitted related only to her subjective state of mind at the time she allowed her child to starve, nearly to death. Our Supreme Court rejected the argument that a defendant's subjective awareness of the risk to the child is relevant, and used examples of types of abuse that would escape punishment if the court accepted such a rationale. "For example, in [*Walker v. Superior*

*Court* (1988) 47 Cal.3d 112], the mother's concern for her daughter and good faith belief prayer would cure her, would negate such subjective intent despite the fact the mother intentionally withheld medical treatment from the four-year-old daughter resulting in her suffering and death. Similarly, the rash of recent infant hyperthermia deaths from parents or other caretakers leaving infants in closed vehicles for long periods of time would also analytically fall within such an approach. Such caretakers could claim they had no idea the car temperature would rapidly rise to a fatal level. Engrafting such a restrictive element onto the statute would contravene the legislative intent to impose criminal liability on persons who flagrantly disregard the health and safety of children in their custody or care." (*Valdez, supra,* 27 Cal.4th at pp. 791.)

Defendant emphasizes that she is claiming that exclusion of the expert testimony deprived her of her federal constitutional right to present a defense. This argument is meritless. "[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible. As we have said: 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' [Citation]." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42.)

Cases addressing the constitutional validity of legislation that abolished the diminished capacity defense considered similar arguments and found no due process violation. (*People v. Saille* (1991) 54 Cal.3d 1103, 1116; *People v. Lynn* (1984) 159 Cal.App.3d 715, 732 (*Lynn*).) The court in *Lynn* explained: "The exclusion of the capacity evidence represented by sections 22, 28 and 29 is not of constitutional dimension [citation]. It is 'nothing more than a legislative determination that for reasons of reliability or public policy, "capacity" evidence is inadmissible' [citation]. The enactment neither prevented [the defendant] from disproving the mental state necessary to the charges nor deprived him of his constitutional right to require the People to prove every fact necessary to constitute the crime beyond a reasonable doubt [citations]." The

same reasoning applies to defendant's claim that she is constitutionally entitled to prove that she did not understand her actions were culpable.

The trial court correctly excluded the evidence of defendant's subjective state of mind.

## CONCLUSION

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Stein, J.

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Margulies, J.